BEFORE THE
FEDERAL COMMUNICATIONS COMMISSION
Washington, DC 20554

In the Matter of	)	
	)	
Application by SBC Communications, Inc., Southwestern Bell Telephone Company, and Southwestern Bell Communications Services, Inc. d/b/a Southwestern Bell Long Distance for Provision of In-Region InterLATA Services in Oklahoma	)	CC Docket No. 97-121

REPLY OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

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SUMMARY

Numerous commentors in this proceeding agreed with CompTel that the FCC must deny the Section 271 application of SBC Communications. Many reasons for this conclusion were offered, including (1) the absence of facilities based competition for both business and residential customers, (2) SBC's failure to provide unbundled local switching or transport, and (3) the inadequacies of the proposed Operations Support Systems. On reply, CompTel wishes to respond to three arguments raised by SBC or another Bell Company.

First, SBC has received 16 requests for interconnection and, therefore, is not eligible for consideration under "Track B" of Section 271. Track B is a limited alternative to Track A included by the Congress for the few situations where no timely interconnection request is received by a BOC.

SBC, however, argues for a tortured tautology whereby a finding that there is no qualified competing provider under Track A automatically would mean SBC qualifies for consideration under Track B. This contention is erroneous for two independent reasons: (1) the words "such provider" in Section 271(c)(1)(B) refer to the initial phrase "unaffiliated competing provider" in Section 271(c)(1)(A) and (2) even if SBC's reading were correct, "such provider" "qualifies" for Track A purposes simply by making a proper request for interconnection, but SBC does not automatically "qualify" for approval under Track A at the same time -- it must fulfill the requests first.

Not only does CompTel's view comport with the language and intent of the Act, it is fair. SBC can receive Section 271 approval by complying with Track A if it receives a request or by meeting Track B if its does not. In either case, the choice belongs to SBC.

Second, CompTel believes that Section 271 requires that a qualifying local competitor must provide both business and residential service predominantly through its own facilities. The language of Section 271(c)(1)(A) references "business *and* residential" services and states that "such telephone exchange service" must be offered predominantly over the CLEC's own facilities. Regardless of the Commission's view of this statutory question, however, in SBC's case there is no competing residential service *of any kind*. Thus, SBC cannot meet the requirements under either reading.

Third, the FCC must merely "consult" with the Oklahoma Corporation Commission, but must give "substantial weight" to the views of the Department of Justice. The DOJ recommended clearly against approval of the SBC application, while the OCC voted 2-1 (over a very strong dissent) to overrule an ALJ's decision recommending rejection of the application. Under these circumstances, the OCC's evaluation of SBC's checklist compliance should carry very little weight.

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REPLY OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION

The Competitive Telecommunications Association ("CompTel"), by its attorneys, respectfully submits the following Reply in response to the Common Carrier Bureau's request for replies to comments filed on SBC Communications, Inc.'s ("SBC") Application for Provision of In-Region InterLATA Services in Oklahoma.[1] The initial comments confirm that SBC's application for interLATA authority is premature because SBC has not satisfied the prerequisites of Section 271. Numerous parties agreed with CompTel's assessment that SBC (1) is not facing actual, facilities-based competition for both business and residential customers in Oklahoma,[2] (2) is not providing unbundled local switching or unbundled transport demonstrated to comply with the Act,[3] (3) is not providing access to Operational

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[1] *Public Notice*, DA 97-753 (rel. April 11, 1997).

[2] *See, e.g., ALTS' Motion to Dismiss*; *Brooks' Comments* at 6-8; *WorldCom's Comments* at 8-10.

[3] *See AT&T's Comments* at 24-26; *WorldCom's Comments* at 37-38.

Support Systems ("OSS") validated by commercial experience,[4] and (4) has not shown that grant of its application is consistent with the public interest, convenience and necessity.[5] The United States Department of Justice ("DOJ") concurs and recommends that the Commission deny the application because, "stated simply, SBC's application . . . does not satisfy the statutory criteria and the Act's underlying objective of ensuring that local markets are open to competition."[6] Therefore, based upon the record in this docket -- and giving "substantial weight" to DOJ's analysis of the state of local competition in Oklahoma -- the Commission should deny the application.

CompTel's Reply focuses on three issues which require additional response. They are (1) the arguments by SBC and its sister BOCs that Track B applies here, (2) whether a provider offering residential services exclusively through resale can qualify under Section 271(c)(1)(A) if the provider serves business subscribers predominantly with its own facilities, and (3) the appropriate weight to be given to the Oklahoma Corporation Commission's recommendation with regard to SBC's checklist compliance.

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[4] *See, e.g., AT&T's Comments* at 28-33; *MCI's Comments* at 4-7; *NCTA's Comments* at 18-19.

[5] *See, e.g., Competition Policy Institute's Comments* at 10-12; *Cox Communications' Comments* at 15-23; *Dobson Wireless' Comments* at 7-10; *WorldCom's Comments* at 43-48.

[6] *Evaluation of the United States Department of Justice* at 2.

I. TRACK B IS UNAVAILABLE TO SBC IN OKLAHOMA

In light of the clear failure by SBC to make the prima facie showing required by "Track A", it appears that SBC's emphasis -- and that of the BOCs as a group -- has shifted to the "Track B" alternative.[7] However, SBC's reliance on Track B is woefully misplaced. If, as SBC asserts, it is true that SBC has negotiated or is in the process of negotiating interconnection agreements with no less than sixteen unaffiliated competitive providers,[8] then the "Track B" option for BOC in-region interLATA entry, by its own terms, must be disabled.

Congress provided Track B as a limited alternative to the actual competition test of Track A. It was intended to address the perceived possibility that no CLECs will seek to enter a state in a manner that would satisfy Track A.[9] Therefore, Track B only is available when "no such [unaffiliated competing] provider has requested the access and interconnection described in . . . [Track] A."[10] If any unaffiliated competing provider has requested interconnection, the BOC must satisfy the requirements of Track A. Given SBC's assertion that it has negotiated no less than sixteen interconnection agreements, clearly an "unaffiliated

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[7] *See, e.g., SBC's Opposition to ALTS' Motion* at 8-9 and 13-17, *Nynex's Comments on ALTS' Motion* at 5, *BellSouth's Comments on ALTS' Motion* at 2-3, and *U S West's Comments on ALTS' Motion* at 3-5.

[8] *SBC's Brief* at 4-5 and n.6.

[9] H.R. Conf. Rep. No. 104-458, 104th Cong., 2d Sess. at 148 (1996)(*"Joint Explanatory Statement"*).

[10] 47 U.S.C. § 271(c)(1)(B).

competing provider" has requested access to SBC's network.[11] Indeed, it is implausible to suggest that not one of these sixteen would-be competitors had requested access and interconnection to SBC's network that, once fully implemented, would lead to its provision of competitive, facilities-based service to residential and business subscribers. SBC certainly has offered no proof that this is the case in Oklahoma.

In fact, Track B should remain closed to SBC until such time that SBC can prove that *none* of those competitors have requested the type of interconnection contemplated by Track A *or* that *all* of those providers either have (1) failed to negotiate in good faith, or (2) violated the terms of an approved agreement by failing to comply, within a reasonable period of time, with an implementation schedule contained in such agreement.[12]

A. The BOCs' Reading of the "such provider" Language in Track B is Illogical

Rather than demonstrating that it has not received a single request for access and interconnection that, once fully implemented, might contribute to the feasibility of Track A entry, SBC actually asserts that it satisfies Track A because at least one competitor, Brooks, already has interconnected and provides facilities-based residential and business service.[13] However, it is clear that SBC blatantly has mischaracterized Brooks' services and that SBC

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[11] Absent clear and convincing evidence to the contrary, the Commission should presume that a competitor's request seeks "the access and interconnection described in . . . [Track] A".

[12] 47 U.S.C. § 275(c)(1)(B).

[13] *SBC's Brief* at 8-12.

has not satisfied Track A.[14] Thus, SBC, with support from its sister BOCs, now argues in the alternative that if Brooks does not "qualify" under Track A, it has not received any requests that disable Track B.

Not surprisingly, this newly concocted reading of the statute would keep Track B open to any BOC that could not achieve entry under Track A.[15] As SBC and its sisters would have it, Congress used the phrase "such provider" in the disabling language of Track B to ensure that Track B would be disabled only in the special circumstance where a BOC actually could gain Track A entry.[16] Specifically, the BOCs divine that the "such provider" language in Track B refers to a "qualifying competing provider under subsection (A)."[17] Thus, SBC opines that "if the Commission were to hold that Brooks Fiber is not a qualifying competing provider under subsection (A), then it would have to find that Southwestern Bell has not received any interconnection request from 'such provider' and is entitled to file under the plain language of subsection (B)."[18] As ALTS aptly pointed out, the "heads I win, tails you lose" logic of this argument is nothing short of absurd.[19]

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[14] *See Affidavit of John C. Shapleigh* (first attachment to *ALTS' Motion*).

[15] *See also ALTS' Ex Parte Letter* at 1, filed May 8, 1997 ("*ALTS' Ex Parte Letter*").

[16] *See, e.g., SBC's Opposition to ALTS' Motion* at 9.

[17] *Id.*

[18] *Id.*

[19] *ALTS' Ex Parte Letter* at 1, n.1.

First, it is most likely and logical that the phrase "such provider" is a shorthand reference to the "unaffiliated competing providers" referred to in Section 271(c)(1)(A) (Track A).[20] In the first sentence of Section 271(c)(1)(A), Congress set forth the requirement that there must be one or more "unaffiliated competing providers of telephone exchange service" operating within the appropriate state. Then, Congress made a shorthand reference to this class of providers in the second sentence when it used the phrase "such competing providers" in association with the facilities-based provisioning requirement of Track A. The next reference to these providers comes in the phrase in Section 271(c)(1)(B) upon which the BOCs rely so heavily. However, the BOCs' reliance is misplaced. The most logical reading of the phrase "such provider", like the language in the second sentence of Track A ("such competing provider"), is that it refers back to the original "unaffiliated competing provider" set out in the first sentence of Section 271(c)(1)(A).[21]

Second, even if the BOCs' apparent position that the phrase "such provider" means "qualifying facilities-based competitor" is accepted, the only appropriate "qualification" the competitor must meet is that it has requested access and interconnection, that once fully implemented, will enable it to provide facilities-based residential and business services. Thus, the fact that *"such provider" "qualifies"* for purposes of Track A *does not mean that SBC qualifies* for entry under Track A. It merely means that SBC has a received a request that *disqualifies* it for Track B entry.

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[20] 47 U.S.C. § 271(c)(1)(A).

[21] *Id.* at § 271(c)(1)(A) and (B).

Significantly, SBC's argument underscores its fundamental failure to comprehend the requirements of Track A. In creating Track A, Congress placed affirmative obligations on SBC to make competition a reality -- SBC does not win Track A entry simply by having the good fortune of receiving an interconnection request from a facilities-based competitor that seeks to provide service to residential and business customers predominantly over its own facilities. The *applicability* of the Track A test turns on the presence of a "qualifying" interconnection request (*i.e.,* one that seeks access and interconnection of the kind that, once fully implemented, will lead to a competitor's facilities-based provisioning of residential and business exchange service) and *not* upon whether SBC actually has satisfied the substantive requirements of the test. Simply put, because SBC has not satisfied Track A does not mean that it does not apply.

Ultimately, the dispositive feature of Track B is neither the phrase "such provider" nor SBC's inability to comply with Track A. Whether or not SBC has satisfied Track A and whether the "such" in "such provider" refers to a "qualifying facilities based competitor" or, as is more logical, an "unaffiliated competing provider", it is clear that the applicability of the Track B test turns on the absence of a request for the access and interconnection as described in Track A. Thus, contrary to SBC's assertion, the Commission could very well determine that *Brooks "qualifies"* as a carrier that has made a request that, once fully implemented, could facilitate SBC's entry under Track A, but that *SBC does not qualify* for Track A entry at this time.

B. SBC "Has the Keys To InterLATA Entry"

CompTel agrees with SBC that "Congress did not give competitors the keys to Bell company interLATA entry."[22] Rather, SBC is in the driver's seat. It is squarely up to SBC to demonstrate that it has implemented fully requests that qualify under Track A. It can and must do so by fulfilling interconnecting carriers' requests and actually providing the access and interconnection that will make local competition a reality. In the absence of such a showing, SBC has two options. SBC must either (1) demonstrate that, up to the point 3 months prior to its filing of Section 271 application with the FCC, it has received no requests for the access and interconnection described in Track A, *or* (2) take action under the "safety-valve" provision of Track B. To date SBC has done neither.

Under the "safety-valve" option, if SBC feels as though it can demonstrate that interconnecting CLECs are responsible for strategically and unfairly delaying the development of full-fledged facilities-based competition for residential and business subscribers, then SBC may petition the Oklahoma Corporation Commission ("OCC") for certification that *all* providers that have made qualifying requests have either "(i) failed to negotiate in good faith as required by section 252, or (ii) violated the terms of an agreement approved under section 252 by the providers failure to comply, within a reasonable period of time, with the implementation schedule contained in such agreement."[23] SBC alleges that

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[22] *SBC's Opposition to ALTS' Motion* at 13.

[23] 47 U.S.C. § 272(c)(1)(B).

such a demonstration would be impossible.[24] Because so many carriers have requested the type of access and interconnection contemplated by Congress in Track A, SBC is probably right. This is no accident. Track B functions as a back-up -- and not as a back-door -- method of interLATA entry. In short, if SBC has received requests for access and interconnection as described in Track A, then it must work with its competitors to make full-fledged facilities-based competition a reality. Until it can prove that its competitors are unwilling to work toward that end, SBC must take the Track A option.

II. SECTION 271(c)(1)(A) REQUIRES THAT *BOTH* RESIDENTIAL AND BUSINESS CUSTOMERS BE SERVED PREDOMINANTLY OVER A COMPETITOR'S OWN FACILITIES

On May 16, 1997, the United States Department of Justice ("DOJ") filed with the Commission an evaluation of SBC's application in which it concluded that SBC was not eligible for Track B entry and had not met the requirements of Track A.[25] DOJ filed an Addendum to its Evaluation on May 21, 1997, in which it further opined that "Section 271(c)(1)(A) [d]oes [n]ot [r]equire [t]hat [b]oth [r]esidential and [b]usiness [c]ustomers [b]e [s]erved [o]ver the [f]acilities-[b]ased [c]ompetitors' [o]wn [f]acilities."[26] CompTel disagrees. Further, CompTel submits that the Commission need not reach this issue at this time because Brooks is not serving any residential customers in Oklahoma.

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[24] *SBC's Opposition to ALTS' Motion* at 15.

[25] *Evaluation of the United States Department of Justice* at 8 and 20-21. Specifically, DOJ concluded that Brooks is not providing residential service at this time. *Id.* at 20.

[26] *Addendum to the Evaluation of the United States Department of Justice* at 2.

If, however, the Commission treats Brooks' test as "residential service", under the Act, CompTel believes that SBC's application still must be dismissed because the facilities-based test of Track A *cannot* be satisfied when service to an entire class of customers is accomplished solely through resale. Contrary to DOJ's analysis, CompTel believes that the statute requires that both residential *and* business subscribers be served by a competing provider, and that "such telephone exchange service", *i.e.*, both classes of service -- residential *and* business, must be offered exclusively or predominantly over the facilities of the competitor.[27]

Specifically, Section 271(c)(1)(A) requires that a BOC must provide "access and interconnection to its network facilities for the network facilities of one or more unaffiliated competing providers of telephone exchange service . . . to residential *and* business subscribers."[28] Two separate tests are implicit in this language: the facilities-based carrier must be providing (1) a telephone exchange service to residential subscribers and (2) a telephone exchange service to business subscribers. The statute further provides that "such telephone exchange service" must be offered "either exclusively over [the competing providers'] own telephone exchange service facilities or predominantly over their own telephone exchange service facilities in combination with the resale of the telecommunications services of another carrier."[29] This requirement is intended to ensure that a "telephone

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[27] 47 U.S.C. § 272(c)(1)(A).

[28] *Id.*

[29] *Id.*

exchange service offered exclusively through the resale of the BOC's telephone exchange service" does *not* satisfy Track A.[30] CompTel believes that this language plainly means that the facilities-based test must be applied to each of the two service tests (residential and business) established in Section 271(c)(1)(A). Therefore, *each* class of customers -- residential *and* business -- must be served either exclusively or predominantly over the facilities of the unaffiliated competing provider.

CompTel believes that this reading is not only consistent with the language of the statute, but that it also is the only reading that serves Congress' goal of breaking the bottleneck control that the BOCs have over the local loop. Congress built the facilities-based requirement into Track A to provide BOCs with an incentive to take measures that would encourage the development of facilities-based competition for *both* residential *and* business customers.[31] It simply makes no sense to make that requirement apply to one class of service and not the other. If, as DOJ suggests, it does not matter that the competing provider reaches residential customers only through resale, then it is all but certain that the BOCs will do little or nothing to loosen their bottleneck control of the residential local loop. However, there simply is no evidence that Congress intended to reserve the benefits of full scale facilities-based competition for business customers only. Yet, that plainly will be the result if DOJ's reading of the facilities-based requirement is accepted. Outside of Section

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[30] *Joint Explanatory Statement* at 147.

[31] The Joint Explanatory Statement makes clear that Congress expected facilities-based competition was possible in the residential market. *Id.* at 148 (discussing possible entry by cable television providers).

271, the BOCs have no other incentive to make competitive facilities-based residential service a reality.

Finally, the fact that Congress expressly provided that the competitor may be providing services "predominantly" over its own facilities "in combination with the resale of another carrier" does not mean, as DOJ suggests, that Congress contemplated that an entire class of customers could be serviced entirely through resale. Rather, it was intended to recognize that competitors likely will need to purchase access services and unbundled network elements, including loops, in order to make general offerings of residential and business services. Such services can be purchased from "another carrier" including competitive access providers and the BOCs. Had Congress intended to limit its requirement in a way that allows for pure resale to an entire class of customers, it likely would have used the term "Bell operating company" rather than "another carrier".

III. THE CONSULTATION REQUIRED BY SECTION 271(d)(2)(B) DOES NOT BIND THE FCC TO THE ERRONEOUS CONCLUSION REACHED BY THE OKLAHOMA CORPORATION COMMISSION

The language of Section 271(d) makes it clear that the decision as to whether a BOC complies with Section 271(c) is the Commission's to make.[32] Section 271(d)(2) requires that the Commission consult with both the Attorney General and, in this case, the OCC prior to reaching its decision.[33] In fact, Subsection (d)(2)(A) requires that the Attorney General

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[32] *Id.* § 271(d) ("The Commission shall not approve the authorization requested in an application submitted under paragraph (1) unless *it* finds . . . ." (emphasis added)).

[33] *Id.* § 271(d)(2).

evaluate the application under any standard it deems appropriate and that the Commission give "substantial weight" to that evaluation.[34] No similar requirements can be found in Subsection (d)(2)(B).[35] Rather, that subsection merely requires that the Commission consult with the OCC "in order to verify" SBC's compliance with the requirements of subsection (c).[36]

This distinction between the two consultation requirements is most telling. Rather than require (1) the affected state commission to evaluate a BOC's application and (2) the Commission to afford such an evaluation substantial weight, Congress simply requires that the Commission turn to the affected state commission for assistance in its effort to "verify" a BOC's compliance with subsection (c). Thus, the Commission merely is required to turn to the OCC for assistance in verifying particular facts alleged by SBC and is not in any way bound or even required to give any degree of deference to the recommendation of the OCC.

Indeed, there is much to suggest that the OCC's recommendation that SBC be allowed to enter the interLATA market rests on shaky factual and legal grounds, and therefore, should be disregarded.[37] As OCC Vice Chairman Bob Anthony notes in his dissenting opinion, the OCC's conclusion that SBC should be allowed into the interLATA market is at

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[34] *Id.* § 271(d)(2)(A).

[35] *Id.* § 271(d)(2)(B).

[36] *Id.*

[37] *See Application of Ernest G. Johnson, Director of the Public Utility Division, Oklahoma Corporation Commission to Explore the Requirements of Section 271 of the Telecommunications Act of 1996*, Cause No. PUD 970000064, *Final Order*, Order No. 411817 (Apr. 30, 1997)("*OCC Section 271 Decision*").

odds with the Report and Recommendation of the OCC Administrative Law Judge, the position of the OCC's Public Utility Staff, and the arguments of the Oklahoma Attorney General.[38]

Moreover, despite the fact that the FCC and DOJ recommended a full evidentiary hearing in cases such as this, none was held.[39] Thus, as Vice Chairman Anthony suggests in his dissenting opinion, CompTel believes that the record supporting the OCC's decision is suspect.[40] Further, the Commission certainly should take under advisement Vice Chairman Anthony's observation that SBC's barrage of advertising and lobbying activities created a chaotic atmosphere in Oklahoma -- one that CompTel believes could not have been conducive to reasoned decision making.[41] In sum, to the extent that it considers the OCC's recommendation, the Commission ought to be mindful of Vice Chairman Anthony's assessment that "the FCC would have found it easier to see through the dust cloud produced by the horses and wagons at the Oklahoma Land Run than to see any substantive facts and credible evidence supporting the majority decision in this case."[42]

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[38] *Id., Dissenting Opinion of Commissioner Bob Anthony* at 2.

[39] *Id. See also Application of Ernest G. Johnson to Explore the Requirements of Section 271 of the Telecommunications Act of 1996* at 2 (Feb. 6, 1997)(noting that the "FCC and DOJ recommended that a full evidentiary hearing be conducted."); *Speech of Reed Hundt, Chairman, Federal Communications Commission, to the Communications Committee, National Association of Regulatory Utility Commissioners*, July 23, 1996 <http://www.fcc.gov/speeches/Hundt/spreh631.txt>.

[40] *Dissenting Opinion of Commissioner Bob Anthony* at 3.

[41] *Id.* at 1-2.

[42] *Id.*

Finally, CompTel notes that while the OCC's expressed desire to have CLECs prioritize and expedite entry into Oklahoma markets is laudable, it supplies no justification for ignoring the will of Congress as expressed in Section 271(c).[43] Thus, the OCC's rationale that recommending approval of SBC's entry into the interLATA market will cause CLECs to prioritize entry into Oklahoma does not *and cannot* compensate for SBC's failure to qualify for either Track A or Track B entry, or for any failure to meet each and every requisite of the competitive checklist of Section 271(c)(2)(b).

[43] *Comments of the Oklahoma Corporation Commission* at 10-11, *Additional Comments of Cody L. Graves, Chairman of the Oklahoma Corporation Commission* at 2; *OCC Section 271 Decision* at 3.

CONCLUSION

For the all the foregoing reasons, it is clear that SBC has not established a *prima facie* case of compliance with Track A. Moreover, it has not demonstrated that Track B entry should be made available to it. Accordingly, the Commission should promptly dismiss SBC's application.

Respectfully submitted,

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May 27, 1997

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing REPLY OF THE COMPETITIVE TELECOMMUNICATIONS ASSOCIATION to be delivered on this 27th day of May, 1997 by either first class mail, postage prepaid or by hand to all parties listed on the attached service list:

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